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PP

v.

AGUS AGIL

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COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: B-05-23-2005]

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27 APRIL 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - 341.1gms of methamphetamine - Charge amended to one of possession by High Court - High Court finding that*

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accused had no intention to traffic in the dangerous drugs - Whether High Court had erred - Whether large amount of drugs in accused's possession indicated that the drugs were not for accused's personal consumption - Accused arrested with large amount of drugs concealed on his person while waiting to board a flight back to his country of origin - Whether intention

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to traffic in the said drugs established - Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

On 16 May 1998, the respondent was at the airport waiting to board a flight back to Indonesia. At the boarding gates, PW4 conducted a body search on the respondent and suspected something hidden on

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the respondent's thighs underneath his pants. On PW4's instructions, the respondent took out from his pants two plastic packages containing a crystalline substance later confirmed to contain 298.3gms of methamphetamine. This amount grounded a

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separate charge against the respondent. The respondent was then escorted to the airport police station and handed over to SP6. SP6 proceeded to re-arrest the respondent. The respondent was then taken to the Damansara Police Station. At the station, whilst the respondent was undressing before SP11, PW10 noticed two plastic

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packages dropping from the respondent's underpants. These packages also contained a crystalline substance later confirmed to contain 341.1gms of methamphetamine. This 341.1gms of methamphetamine formed the substance of the instant charge against the respondent under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). In the High Court the trial judge found that the prosecution had

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failed to prove a *prima facie* case of trafficking against the

respondent. The judge was of the view that since the appellant was already arrested and detained, he no longer had the necessary intention to traffic. The judge however found that the drugs were in the respondent's possession. The judge thus amended the charge to one of possession under s. 12(2) of the Act and upon the respondent's guilty plea, sentenced him to four years' imprisonment. The prosecution appealed against the trial judge's decision. At the date of the commission of the offence, methamphetamine was not yet listed under s. 37 para. (da)(xvi) of the Act, which now allows the prosecution to invoke the presumption of trafficking against anyone found in possession of 50gms or more of methamphetamine. The prosecution thus had to prove trafficking against the respondent.

Held (allowing the prosecution's appeal)
Per Hasan Lah JCA:

(1) Although the prosecution had not adduced evidence to show how large a quantity of drugs the respondent had in his possession, some four months after the offence, s. 37(da) of the Act was amended to include a presumption of trafficking in respect of 50gms or more of methamphetamine (see para. (xvi) of s. 37(da)). In the instant case, the weight of the drugs involved was more than six times the minimum weight of 50gms. An inference could thus be drawn that the 341.1gms of methamphetamine in the respondent's possession was a large quantity and not intended for the respondent's personal use. (para 20)

(2) The trial judge erred in finding that the respondent did not have the necessary intention to traffic the drugs because the drugs were recovered from him after he had been detained and under police detention. The facts indicated that the drugs were already in the respondent's possession while he was at the airport waiting to board a plane to return to Indonesia. The respondent had the intention to traffic the said drugs from the beginning. There was otherwise no need for the respondent to bring back such a large quantity of drugs to Indonesia. (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Pada 16 Mei 1998, responden berada di lapangan terbang sedang menunggu penerbangannya balik ke Indonesia. Di pintu kelepasan, PW4 melakukan suatu pemeriksaan badan atas responden dan mensyaki ada sesuatu yang disembunyikan pada paha responden di dalam seluarnya. Mengikut arahan PW4, responden mengeluarkan dari seluarnya dua pakej plastik mengandungi bahan kristalin yang selepas itu disahkan mengandungi 298.3gm methamphetamine. Amaun ini berasaskan suatu tuduhan berasingan terhadap responden. Responden kemudiannya dibawa ke stesen polis lapangan terbang dan diserahkan kepada SP6. SP6 terus menangkap semula responden. Responden kemudiannya dibawa ke Stesen Polis Damansara. Di stesen tersebut, sementara responden membuka baju di depan SP11, PW10 nampak dua pakej plastik jatuh dari pakaian dalam responden. Pakej-pakej ini juga mengandungi bahan kristalin yang selepas itu disahkan mengandungi 341.1gm methamphetamine. 341.1gm methamphetamine tersebut membentuk isi tuduhan semasa terhadap responden di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Dalam Mahkamah Tinggi hakim perbicaraan memutuskan bahawa pendakwaan telah gagal membuktikan suatu kes *prima facie* mengedar terhadap responden. Hakim berpendapat bahawa oleh kerana perayu telahpun ditangkap dan ditahan, beliau tidak lagi mempunyai niat yang perlu untuk mengedar. Hakim walau bagaimanapun mendapati bahawa dadah tersebut berada dalam milikan responden. Hakim oleh itu meminda tuduhan kepada satu tuduhan milikan di bawah s. 12(2) Akta dan atas rayuan bersalah responden, menghukumnya kepada empat tahun pemenjaraan. Pendakwaan merayu terhadap keputusan hakim perbicaraan. Pada tarikh kesalahan itu telah dilakukan, methamphetamine belum lagi disenaraikan di bawah perenggan (da)(xvi) Akta, yang kini membenarkan pendakwaan menggunakan anggapan mengedar terhadap sesiapa yang dijumpai memiliki 50gm atau lebih methamphetamine. Pendakwaan oleh itu perlu membuktikan tuduhan mengedar terhadap responden.

Diputuskan (membenarkan rayuan pendakwaan)
Oleh Hasan Lah HMR:

(1) Walaupun pendakwaan tidak mengemukakan keterangan untuk menunjukkan berapa banyak kuantiti dadah responden mempunyai dalam milikannya, kira-kira empat bulan selepas kesalahan tersebut, s. 37(da) Akta telah dipinda untuk

mengandungi anggapan mengedar berhubungan dengan 50gm atau lebih methamphetamine (tengok perenggan (xvi) s. 37(da)). Dalam kes semasa, berat dadah terlibat adalah lebih dari enam kali berat minima 50gm. Suatu inferens boleh oleh itu dibuat bahawa 341.1gm methemphetamine di dalam milikan responden adalah suatu kuantiti besar dan tidak diniatkan bagi kegunaan peribadi responden.

(2) Hakim perbicaraan khilaf apabila memutuskan bahawa responden tidak mempunyai niat yang perlu untuk mengedar dadah tersebut kerana dadah tersebut telah didapati darinya selepas beliau telahpun ditahan dan di bawah tahanan polis. Fakta-fakta menunjukkan bahawa dadah tersebut telahpun berada dalam milikan responden semasa beliau berada di lapangan terbang menunggu penerbangannya kembali ke Indonesia. Responden mempunyai niat untuk mengedar dadah tersebut dari mulanya. Kalau tidak responden tidak perlu membawa balik kuantiti dadah sebanyak itu ke Indonesia.

Case(s) referred to:
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
PP v. Abdul Manaf Mohamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Karim Ab Jabar [2008] 5 CLJ 173 CA ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), (3), 37(da), 39B(1)(a)

For the appellant - Nurulhuda Nuraini Mohd Noor DPP; AG's Chambers
For the respondent - T Vijayandran; M/s T Vijay & Co

[Appeal from High Court, Shah Alam; Criminal Trial Nos: 47-9-2000 & 47-17-2000]

Reported by Andrew Christopher Simon

JUDGMENT

Hasan Lah JCA:

[1] This is an appeal by the Public Prosecutor against the decision of the learned trial judge in the High Court at Shah Alam amending the original charge of trafficking in 341.1 grammes of

A methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") against the respondent (the accused in the High Court) to one of possession punishable under s. 12(3) of the same Act. The respondent pleaded guilty to the amended charge and was sentenced to 4½ years with effect from the date of his conviction
B ie, 9 December 2005.

[2] We heard this appeal on 13 December 2008 and unanimously allowed it. We now give the grounds of our decision.

C **[3]** The facts of the case as found by the learned trial judge are as follows. The respondent is an Indonesian who came to Malaysia for a short visit on 14 May 1998. He wanted to go back to Indonesia on 16 May 1998. At the Subang International Airport at about 6.20pm PW4 (Kpl. Joseph Bartram Anak Brain), a security
D assistant on duty at Gate 6, Terminal 1 of the Subang Airport, conducted a body search on the respondent. PW4 suspected that something was hidden on both part of the thigh underneath the pants worn by the respondent. On PW4's instruction, the respondent took out from underneath his pants two black plastic packages
E containing crystalline substance which was later confirmed by the chemist to contain 298.3 grammes of methamphetamine, the subject matter of another charge.

[4] PW4 proceeded to seize the respondent's international passport, boarding pass and air ticket and escorted him to the
F airport police station where the respondent was handed over to SP6 (Sjn. Jagdev Singh a/l Saran Singh) at about 8.20pm. SP6 then rearrested the respondent. From there, the respondent was then brought to the Damansara Police Station at about 10.45pm by SP7 (L/Kpl Zamrus bin Abd. Kudus) and L/Kpl Jelani bin Mohamad
G Nor.

[5] At the Damansara Police Station the respondent was handed over to Sjn. Ahmad bin Othman (SP8) at about 10.50pm who then sent the respondent to the lock-up. PW10 (L/Kpl Che Manan bin
H Rejab) and PW11 (L/Kpl Akhbar bin Nayan) were on duty at the station's lock-up at that time. They received the respondent at about 11.10pm from L/Kpl Jelani bin Mohamad Nor). SP11 carried out body check on the respondent and the respondent was asked to undress. While the respondent was undressing his underpants PW10
I saw two black plastic packages dropped from the underpants. PW10 checked the content of the two packages and found that they contained crystalline substance.

When PW10 asked the respondent about that the respondent said they were "Chinese vitamin medicine". The chemist later confirmed that the crystalline substance contained 341.1 grammes of methamphetamine. It is the subject-matter of the charge in this case.

[6] At the close of the case for the prosecution the learned trial judge held that the prosecution failed to prove a *prima facie* case against the respondent on the basis that since the appellant was already arrested and detained he no longer had the necessary intention to traffic. This is what the learned trial judge said in his judgment:

> Mengenai pertuduhan kedua iaitu bagi dadah yang dijumpai di tempat pemeriksaan di lokap Balai Polis Damansara, saya mendapati bahawa pendakwaan gagal membuktikan kes *prima facie* pengedaran dadah terhadap tertuduh. Pada penghakiman saya seorang yang telah digari kedua-dua tangannya sejak ia mula ditahan di lapangan terbang dan sentiasa di dalam kawalan dan jagaan polis sehingga dadah tersebut dijumpai semasa pemeriksaan di lokap, tidak mungkin lagi boleh mengedar dadah. Jika sekalipun diandaikan OKT mempunyai niat untuk mengedar dadah sebelum ia ditangkap di lapangan terbang niat tersebut secara logiknya sudah tidak wujud lagi dan dilupakannya apabila ia telah ditangkap, digari dan dikawal sepanjang masa oleh polis. Pendakwaan tidak ada mengemukakan sebarang keterangan bahawa OKT cuba melakukan sesuatu bagi menyembunyikan dadah tersebut, untuk tujuan pengedaran selepas ia ditangkap. Dadah tersebut tidak dijumpai lebih awal semata-mata kerana polis atau SP4 tidak membuat pemeriksaan fizikal secara rapi ke atas OKT selepas ia ditahan. Jika sekalipun diandaikan anggapan pengedaran dadah di bawah seksyen 37(da) ADB terpakai, anggapan tersebut bukanlah satu anggapan yang tidak boleh disangkal. Pada saya, fakta kes ini sendiri sudah mencukupi untuk menyangkal sebarang anggapan pengedaran dadah.

[7] The learned trial judge, however, found that the drug was in the possession of the respondent. He accordingly amended the charge to an offence under s. 12(2) of the Act. The responded pleaded guilty to the amended charge and he was sentenced to 4½ years of imprisonment.

[8] In the hearing of the appeal before us the respondent did not dispute the learned trial judge's finding that the respondent was in actual possession of the said drugs. In his judgment the learned

A trial judge held that the respondent had the custody, control and exclusive possession of the two packages containing the said drugs. With regard to the knowledge he said:

> Dalam kes ini inferens mengenai pengetahuan tertuduh terhadap dadah tersebut dapat dibuat dari perbuatan tertuduh yang sengaja menyembunyikan bungkusan tersebut di dalam seluarnya. Tindakan ini tidak konsisten dengan kelakuan seseorang yang tidak bersalah. Ia tidak perlu bersusah payah menyembunyikannya jika ia adalah ubat yang tidak menyalahi undang-undang.

C We too, after having given careful consideration to the facts of the case, agree with the learned trial judge's finding that the respondent had actual possession of the said drugs in view of the manner in which the respondent carried the drugs on his person.

D **[9]** As such, the only issue for determination in this appeal was whether the respondent was trafficking in the said drugs. The learned deputy public prosecutor contended that based on the facts of the case the respondent had the intention to traffic in the said drugs prior to his arrest. The respondent was in fact waiting to E board the aeroplane to fly back to Indonesia. At that time the said drugs were already in his possession.

[10] It must be noted that at the date of the commission of the offence methamphetamine was not included in para. (da) of s. 37 of the Act which provides for presumption of trafficking in certain F drugs. As such the prosecution could not use the presumption of trafficking in s. 37(da) of the Act to prove its case against the respondent. The prosecution therefore had to prove by evidence that the respondent was trafficking in the said drugs.

G **[11]** The learned deputy public prosecutor submitted that what was done by the respondent amounted to the act of trafficking of the said drugs as defined under s. 2 of the Act. In support of that the learned deputy public prosecutor cited the case of *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64.

H **[12]** In response to that learned counsel for the respondent submitted that mere act of carrying the said drugs is not sufficient to constitute the offence of trafficking. In support of that he referred to the observation made by Lord Diplock in *Ong Ah Chuan v. Public* I *Prosecutor (supra)* at p. 68 that:

> To "traffic" in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of "traffic" and "trafficking" in section 2. Even apart from any statutory definition, the ordinary meaning of the verb "to traffic", in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied.

[13] According to him Augustine Paul J (as he then was) held in *PP v. Mohd Farid Mohd Sukis & Anor* [2002] 8 CLJ 814 that the mere act of, say, "keeping", or "concealing" or "carrying" dangerous drugs as enumerated in s. 2 of the Act would not constitute "trafficking" without any further evidence of an intention to trade or deal in them.

[14] It is the respondent's contention that the word "trafficking" in the Act must be given its ordinary meaning and the legal meaning of "trafficking" as defined in *Black's Law Dictionary*, 6th edn. is:

> Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales.

[15] Learned counsel for the respondent further submitted that in the instant case the prosecution did not lead evidence to show that the quantity of the said drugs carried by the respondent was large. There was no evidence to show what was the quantity of the drugs consumed by an average addict or the value of the said drugs.

[16] It is trite law that mere keeping, concealing or carrying of the drugs is not sufficient to constitute trafficking. Lord Diplock in *Ong Ah Chuan*'s case, however, also said at p. 69 that:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the

A purpose of trafficking in them would, in the absence of any plausible examination by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for
B the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

[17] In *PP v. Karim Ab Jabar* [2008] 5 CLJ 173, 10.384 kg of cannabis was recovered from the car driven by the respondent. Gopal
C Sri Ram JCA, after referring to the passage above from *Ong Ah Chuan*'s case said at p. 177 that:

[8] In the present appeal the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his
D personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it. Unfortunately, the learned trial judge in the court below did not direct his mind along these lines.

E **[18]** In *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65, the appellant was transporting 133 kg of cannabis in a car. The High Court judge convicted him of the offence of trafficking. On appeal, this court, through Gopal Sri Ram JCA said at p. 75 that:

F Applying the common sense approach laid down by Lord Diplock in *Ong Ah Chuan*, the learned judge's conclusion that the appellant was guilty of trafficking is abundantly justified.

This is how the learned judge put it at p 24 of his judgment:

G I find the story and the defence of the accused has not raised any reasonable doubt on the prosecution case that he was in exclusive control and custody of the cannabis in the car at about 4.30 pm on 17 January 1997 and that he was aware of the nature of the cannabis in the car – that he was in
H possession of the cannabis – and that he transported the cannabis in the car from outside Kg Chubadak Dalam to Kg Chubadak Dalam, Sentul Pasar. I find him guilty on the charge save that the date and time of the offence is amended to read as occurring on 17 January 1997 at about 4.30 pm. And I convict the accused on the charge.

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> We find counsel's attack on this finding by the learned judge to be without merit. It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save for the purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For that reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

[19] In *PP v. Abdul Manaf Mohamad Hassan* [2006] 2 CLJ 129 Ariffin Zakaria FCJ (as he then was) said at p. 149:

> [21] In the present case, the drug was carried in small plastic packets each containing small quantity of the drug. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09g of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57g of heroin was found in the left side pocket of the track top he was wearing, 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. Judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption. In any event, it was never suggested in his defence that it was so. His defence was a mere denial that the drug was ever found on him. This was rejected by the learned trial judge. We are satisfied he was not just a passive carrier. Armed with these facts, we are satisfied that had the learned trial properly directed himself, he would nonetheless have come to the same finding. In the circumstances, we hold that the Court of Appeal ought to have applied the proviso to s. 60(1) of the CJA and uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge. For the above reasons, this appeal is allowed and the order of the Court of Appeal is set aside. Accordingly, the conviction and sentence imposed by the High Court are reinstated and affirmed.

[20] It is true as submitted by learned counsel for the respondent that no evidence was adduced by the prosecution to show the value of the said drugs or how many people could consume that quantity

of methamphetamine so as to show that the quantity of the drugs found in the respondent's possession was large. However, when s. 37(da) was amended later by the Dangerous Drugs (Amendment) Act 1998 (Act A1025) and came into force from 15 September 1998, which was four months after the commission of the offence, a presumption of trafficking was included in respect of 50 grammes or more in weight of methamphetamine. As such we are of the view that an inference that may be drawn is that the 341.1 grammes of methamphetamine found in possession of the respondent was large in quantity and so it was not intended for the respondent personal consumption. It is to be observed that the weight of the drug involved was more than six times of the minimum weight of 50 grammes and it was therefore far in excess of what he would normally require for his personal use, if any.

[21] With regard to the learned trial judge's finding that the respondent did not have the necessary intention to traffic the said drugs because when the said drugs was recovered from him he was already under arrest and being detained in the police lock-up, with respect, we are of the view that the learned trial judge erred in his finding. It is to be noted that this is not a case whereby the drugs were obtained by the respondent while he was in the police lock-up. The facts clearly show that the said drugs were already in his possession while he was at the airport waiting to board a plane to go back to Indonesia. The facts of the case, in our view, show that, the respondent had the intention to traffic the said drug from the beginning. The learned trial judge should have viewed the prosecution evidence in its entirety when considering whether the respondent had the intention to traffic the said drugs. What the learned trial judge did here was to consider only the evidence as to what had happened in the police lock-up. The evidence adduced by the prosecution clearly show that there was an intention by the respondent to traffic the said drugs, otherwise why was the need to bring back the drugs to Indonesia in a large quantity.

[22] For the reasons already given we held that the prosecution has proved a *prima facie* case against the respondent on the original charge. We therefore allowed the appeal by the prosecution. The decision of the learned trial judge in reducing the charge and in convicting and sentencing the respondent on the amended charged was set aside. The respondent's defence ought to be called on the

original charge proffered against him. The case was therefore remitted back to the High Court for the accused's defence to be called on the original charge under s. 39B(1)(a) of the Act by the learned trial judge.